UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEBORAH OGLE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-314-P-H***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether the commissioner erred in concluding that as of the plaintiff=s date last insured she did not suffer from a severe impairment or combination of impairments. I recommend that the court vacate the commissioner's decision and remand for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff remained insured for disability purposes only through December 31, 1992, Finding 1, Record at 26; that on December 31, 1992 she had bursitis of

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner=s decision and to complete and file a fact sheet available at the Clerk=s Office. Oral argument was held before me on October 5, 2000, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

the left hip, was status/post left knee arthroscopy and was status/post varicose vein ligation, Finding 3, *id*.; that her statements concerning her impairments and their impact on her ability to work at the time her insured status expired were not entirely credible, Finding 4, *id*.; that on December 31, 1992 the plaintiff had no impairment that significantly limited her ability to perform basic work-related functions and therefore did not have a severe impairment, Finding 5, *id*. at 26-27; and that she was not under a disability at any time through December 31, 1992, Finding 6, *id*. at 27.

Following this decision the Appeals Council accepted certain additional materials as part of the record: an April 11, 1998 statement from the plaintiff, an April 17, 1998 memorandum from Samuel Mathis, Esq. and an August 14, 1998 letter from Leonard C. Kaminow, M.D. *Id*. at 14. The Appeals Council subsequently declined to review the decision, *id*. at 12-13, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989). In June 1999 the plaintiff, represented by new counsel, sought an extension of time within which to file an action in federal court and submitted additional materials to the Appeals Council for inclusion in the record, consisting of affidavits of Mark and Karen Williams, Pamela Anderson and Otis Thompson. Record at 6-11. The plaintiff's new counsel also submitted a letter to the Appeals Council dated September 30, 1999, stating in part: "I would appreciate it if you could again substantively review the entire record in light of the new evidence submitted through affidavits, since the combination, in my opinion, requires at least a remand for further development of the record, including a review and examination by an appropriate expert." *Id.* at 5. A hearings and appeals analyst in an October 1999 letter verified the granting of an extension of time but made no mention of the plaintiff's request for further substantive review of the record. *Id*. at 4.

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. at 1124 (quoting Social Security Ruling 85-28).

The plaintiff asserts that the administrative law judge erroneously halted his analysis at Step 2, based in part on inadequate assessment of her credibility, and failed to apply Social Security Ruling 83-20 to determine the date of onset of her disability. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 2-9. She also contends that the Appeals Council erred in failing to address her request to reopen its substantive review. *Id*. at 10-11. I am persuaded that in this case the sequential-evaluation process should not have ended at Step 2 and that accordingly remand is warranted.

II. Discussion

The plaintiff complains *inter alia* that the administrative law judge erred in entirely omitting to apply SSR 83-20 to determine the onset of her disability. *Id*. at 4-9. An onset determination need be made only if the condition at issue has been found to be disabling. *See, e.g.*, SSR 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 49 ("In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability."); *Key v. Callahan*, 109 F.3d 270, 274 (6th Cir.1997) ("Since there was no finding that the claimant is disabled as a result of his mental impairment or any other impairments or combination thereof, no inquiry into onset date is required.").

The administrative law judge in this case never reached the point of analysis at which SSR 83-20 would have been implicated; instead, he simply determined that as of the plaintiff's date last insured her impairments collectively were non-severe. Were this threshold determination supportable, there clearly would have been no need to delve into an onset date. It is not.

The plaintiff testified at her hearing that as far back as 1987 she suffered "pain like a knife being stabbed into the hip joint of my left hip" and "pain across my lower back constantly," with resultant restrictions on sitting and walking. Record at 38-39. The administrative law judge found the plaintiff less than credible and her condition non-severe in part on the basis of what he termed "relatively scant and unpersuasive evidence of severe impairments prior to December 31, 1992." *See id*. at 25. In particular, with respect to the medical evidence, he noted that: (i) per the plaintiff's 1982 Air Force records, she could perform her regular duties, controlling her hip pain with two aspirin per day; (ii) as of 1985 the Air Force deemed plaintiff's hip and knee conditions each only ten percent disabling; (iii) the plaintiff received no increase in severity of disability rating until 1995, subsequent to her date last insured; and (iv) the plaintiff complained in 1994 that her knee pain had increased over

the past year and her hip pain had recently gotten worse again, a time frame subsequent to her date last insured. *Id*. at 25-26.

In making this assessment, the administrative law judge misperceived the nature of "severity" for purposes of a Step 2 determination. Recourse to the basics is helpful:

> A claim may be denied at step two only if the evidence shows that the individual's impairments, when considered in combination, are not medically severe, i.e., do not have more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities. If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.
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> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs.
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> Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued.

SSR 85-28, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 393-94.

The medical evidence cited by the administrative law judge, rather than "clearly establishing" the non-existence of a severe impairment on or before the plaintiff's date last insured, tends to establish the opposite. In the 1982 report, an Air Force medical examiner observed that although the plaintiff could control her hip pain with aspirin and did not see it affecting her job in any way, she was "unable to perform aerobic or any other job requiring prolonged standing or walking." Record at 179-80. The focus at Step 2 is not on ability to perform a certain job, but to perform basic work activities. The fact that the plaintiff in 1985 was granted a combined twenty percent disability by the Department

of Veterans Affairs, *see id*. at 124, likewise tends to counsel in favor of a finding that she adduced sufficient evidence to meet her *de minimis* Step 2 burden.

That the plaintiff in 1994 reported a yearlong increase in severity of her pain, *see id*. at 139, 153, and in 1995 obtained a higher Department of Veterans Affairs disability rating, do not, standing alone, clearly establish that her pre-1993 levels of pain were non-severe as that term is understood for purposes of Step 2 analysis. Finally, a 1997 medical report available to but not discussed by the administrative law judge diagnosed a back condition of possible long-standing that could have explained the plaintiff's assertions of chronic hip pain. *See id*. at 161 (report of Leonard C. Kaminow, M.D. that "[t]he patient has anatomic evidence of degenerative disk and joint disease, particularly at L4 5 and L3 4. In addition, some of her radiating pain is likely due to an L4 root compromise and possibly L5 root compromise. Some of her changes appear to be old chronic changes which could have been going on for years, although it is difficult to age the disk herniation. Certainly, this could be a cause of her hip pain since radiculopathies can cause hip pain and is the most likely cause of her leg discomfort.").[2]

The administrative law judge's further non-medical bases for his finding of non-severity that the plaintiff omitted to mention her alleged chronic pain to social workers assessing possible depression in 1995, indicated an ability at that time to care for her two small children, help her disabled mother and possibly attend school part-time, and failed to apply for SSD benefits until eight years after the onset of the allegedly disabling pain, *see id*. at 25-26, do not raise sufficient doubt to reject the conclusion suggested by the medical evidence that the plaintiff had a severe impairment or

[2] The administrative law judge also noted that x-rays taken in 1995 showed no abnormalities of the left hip and only a "mild" loss of medial compartment joint space in the left knee. *See* Record at 25. The suggestion in Dr. Kaminow's report that the plaintiff's pain may have been radiating from her back to her hip would explain the earlier findings regarding her hip.

combination of impairments prior to her date last insured.[3] The sequential-evaluation process in this case was improperly truncated at Step 2.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner=s decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this 6th day of October, 2000.

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David M. Cohen
United States Magistrate Judge

MAG ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-314

[3] The record on appeal contains evidence presented to the Appeals Council but not to the administrative law judge, *see* Record at 203-07, as well as affidavits submitted following the Appeals Council's decision, *see id*. at 6-10. At oral argument I asked counsel for both the plaintiff and the commissioner whether this case hinged on the newly submitted materials. Neither felt it did. I agree, and thus need address neither the question whether these materials may properly be considered by this court, *see, e.g., Brown v. Apfel*, Docket No. 00-1-P-C, Report and Recommended Decision dated June 16, 2000, at 5-6 & n.3 (affirmed July 13, 2000), nor the question whether the Appeals Council erred in failing to act on the plaintiff's request to review late-submitted affidavits.

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Demand: $0,000 Nature of Suit: 864
Lead Docket: None Jurisdiction: US Defendant

Cause: 42:405 Review of HHS Decision (SSID)

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